

Appeal submitted by Town of Georgetown

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF:)	
)	
TOWN OF GEORGETOWN)	NOTICE OF APPEAL TO
SAGadahoc COUNTY)	CONDITIONAL APPROVAL
SHORELAND ZONING ORDINANCE)	AND PARTIAL DENIAL
)	
FILE #13-09)	

Now Comes the town of Georgetown and presents to the Board of Environmental Protection (the Board) their Notice of Appeal.

FACTUAL BACKGROUND

The Town of Georgetown (the Town) adopted a Shoreland Zoning Ordinance in 1993 ('93 Ordinance) with essentially the same terms found in the recently passed ordinance. Exhibit A. The '93 Ordinance contained a definition of development substantially as stated in the then current Guidelines For Municipal Shoreland Zoning Ordinances (the '92 Guidelines) and also contained a more precise definition of "developed area" than provided in the '92 Guidelines. This definition of "developed areas" has been in force since 1993, more than sixteen years. Application of the Town's definition of "developed areas" served to except certain lots from the restrictions of the Resource Protection provisions.

The Town of Georgetown presented to the Commissioner for approval, a Shore Land Zoning Ordinance (the Ordinance) and zoning maps, properly adopted by the Town

on March 11, 2009. Exhibit B. In April 2009, the Commissioner approved substantially the entire newly adopted Ordinance and zoning maps.¹

FINDINGS AND CONCLUSIONS OF THE COMMISSIONER APPEALED

- A. The use of the definition “Developed Area” and its intended purpose, to remove otherwise required Resource Protection District areas, is inconsistent with the requirements of the Guidelines. Therefore, this definition must be deleted from the Ordinance.
- B. The recently adopted Georgetown Shoreland Zoning Data map (Map) has been amended to re-zone a number of lots that had previously been regulated with a Resource Protection District, to now be zoned with a Limited Residential District. This amendment causes the Map to be deficient of the required Resource Protection District designation on fourteen lots along moderate or high value salt marshes or salt meadows. The removal of the Resource Protection District from these lots does not comply with the Guidelines or the Department’s policies for establishing ‘areas which are currently developed.’ The Town has not documented any special local conditions and submitted them to the Commissioner of the Department for Review that supports the elimination of the Resource Protection District in the affected areas.²

The Town appeals both findings A and B above and all conclusions and conditions based on them.

ARGUMENT

- A. The Georgetown’s Ordinance §17 definition of “Developed Area” is consistent with the Guidelines.

Current Guideline § 17 defines “Development” as:

“a change in land use involving alteration of the land, water or vegetation, or the addition or alteration of structures or other construction not naturally occurring.”³
Exhibit C.

Parsing the language one understands that human-wrought change to real property is the controlling factor. Cutting trees, mowing grass, diverting or impounding water, and

¹ Department of Environmental Protection, Town of Georgetown, Sagadahoc County, Shoreland Zoning Ordinance, Mandatory Shoreland Zoning Act, File#13-09, 38M.R.S.A., Section 438-A(3), Conditional Approval and Partial Denial.

² Id. ¶ 3.

³ Administrative Rule 06-096 Chapter 1000, Guidelines For Municipal Shoreland Zoning Ordinances, §17.

adding or removing rock or soil all fall within the GL definition up to the definition's second use of the word "or." The remainder of the sentence encompasses all human activity that relates to structures and physical changes to land that are not the result of "nature." Clearly, this definition is as broad as it is vague. The Guideline's definition is so broad as to be constitutionally unenforceable.

In addition, the concept of "developed area" is repeatedly used throughout the Guidelines.⁴ The Guidelines do not define "developed area."⁵

Georgetown's '93 Ordinance adopted the Guidelines definition of "development" then added a section to define and limit the broader Guideline definition of development. DEP accepted and approved the '93 Ordinance definition.

The '93 "developed area" definition is also included in the 2009 Ordinance. The included "Developed Area" definition is:

"those areas as of 18 November 1993 which: include the actual specific developed area such as an established principal structure and associated accessory structures (including driveways, gardens, and mowed areas but not including any undeveloped areas that may be on the lot); or areas already approved for subdivision or development; or for which there is a valid state-approved waste water disposal design."

This definition is more specific, detailed and restrictive than the Guidelines. It excludes from Resource Protection only properties and their conditions which existed prior to November 18, 1993.

A more restrictive element included in this definition is the "as of 18 November 1993" term. No additional land in Georgetown may be "excepted" from any requirement of the ordinance because of development after 18 November 1993.

⁴e.g., Administrative Rule 06-096 Chapter 1000, Guidelines For Municipal Shoreland Zoning Ordinances. §§ 13(A), 13(A)(5), 13(B), 13(D)(1)(C), 13(E), 13(F), 15 n.3, 15(B)(5)(f), 15(J)(1), 15(Q)(2), 15(R), 15(T), 16(D)(8), and 16(E)(3)(b).

⁵ Administrative Rule 06-096 Chapter 1000, Guidelines For Municipal Shoreland Zoning Ordinances.

Comparing Georgetown's definition of Developed areas with the Guidelines as a whole, one sees how the definition is consistent. Guideline Section 13, Establishment of Districts heavily relies on the developed area concept throughout.⁶ The concept is crucial for describing land encompassed by the Resource Protection District, Limited Residential District, Limited Commercial District, General Development Districts I and II, and the Commercial Fisheries/Maritime Activities District. In particular and relevant to this appeal, Guideline §13 (A) Resource Protection District (RP)⁷ uses the developed area concept to except "currently developed" areas from the RP district.

Grandfathering developed lots makes solid common sense. It protects owners that invest large sums of money in their land by building homes and improving their lots, and those land owners that subdivide their land, build roads, and incur the substantial cost of developing land for sale. These owner investments and the economic benefit derived from them depend on reliable and consistent application of land use laws.

The Commissioner did not, in his order, state how Georgetown's "developed area" is inconsistent with the State's Guidelines. Nor has he shown how, as applied, Georgetown's "developed area" definition versus the Guidelines would require a different result as to the treatment of the fourteen lots ordered "returned" to Resource Protection.

The Commissioner's findings regarding the Ordinance definition of "developed area" are incorrect. The purpose of the definition is to clarify a concept used throughout

⁶ Id. §13

⁷ Id. §13(A) **Resource Protection District**. The Resource Protection District includes areas in which development would adversely affect water quality, productive habitat, biological ecosystems, or scenic and natural values. This district shall include the following areas when they occur within the limits of the shoreland zone, exclusive of the Stream Protection District, *except that areas which are currently developed and* areas which meet the criteria for the Limited Commercial, General Development I, or Commercial Fisheries/Maritime Activities Districts need not be included within the Resource Protection District. (emphasis added)

the Guidelines.⁸ The Town's definition of "developed area" is consistent with the Guidelines and is more restrictive than the Guidelines. Under its terms only areas that satisfy the 1993 definition are exempted by the '93 (as well as the current) Ordinance or may be exempted from the Resource Protection district. No new "development" will be permitted to benefit from the "developed area" exception.

B. Georgetown did not amend its zoning map to remove land from the Resource Protection District.

The Town always, since 1993, treated certain lots as "excepted" from Resource Protection District requirements per its '93 Ordinance. Town land use boards consistently applied the DEP approved '93 Ordinance with DEP knowledge over these more than sixteen years.

DEP, through affidavit, provided key evidence to the Maine Superior Court for litigation in 2007.⁹ (Exhibit D) In 2007 the Town found itself in Superior Court in Bath defending a law suit brought by a citizen to reverse a decision of the Zoning Board of Appeals. In the decision of that case, the Court held that the 1994 Zoning Map approved by the DEP was validly adopted and the operative map under the '93 Ordinance.¹⁰

The Court correctly held that the 1994 Map depicted the Resource Protection District as described by the ordinance but did not depict the land excepted by development completed prior to 18 November 1993.¹¹ Only by looking at the 1994 Map in conjunction with the Ordinance could one determine a lot's District. The Court ruled that the lots with development excepted by terms of the '93 Ordinance were properly

⁸ See Fn. 4.

⁹ Ex. D Affidavit of Mike Morse

¹⁰ Exhibit D, Page 7 ¶1.

¹¹ Id. Page 8.

excluded from the Resource Protection District. This ruling would be so under the '93 Ordinance or the Guidelines.

The Georgetown Ordinance's definition of "developed area" in the 1993 Ordinance was approved by DEP at the time of its adoption. Subsequent amendments to the Town's Ordinance made in 1994, 1995, 2002 and 2007 were approved by DEP. At no time during these years did DEP suggest removal or objection to that definition. Based on these years of review, the Town consistently applied its Ordinance in reliance of DEP's periodic approvals.

The Commissioner moved fourteen lots to the Resource Protection District that the Town had zoned Limited Residential/Recreation, in 1993, with approval of DEP. These lot owners, for more than sixteen years, relied on the consistent application by the Town of its '93 Ordinance. Under the Commissioner's arbitrary and capricious findings, conclusions and Order, the Town will lose the ability to continue making consistent land use decisions regarding these lots. The Town's property owners will lose property value that amounts to a property taking without due process in what amounts to a retroactive act of the State.

RELIEF REQUESTED

The Town asks the Board to review the complete DEP record the Appeal Exhibits and find that the Town's Ordinance definition of "developed area" is consistent with the purposes of the Guidelines, is more restrictive than the Guidelines, and therefore shall remain in the Town's Ordinance.

The Town asks the Board to review the complete DEP record and Appeal Exhibits and to find that the Town's new Zoning Data Map accurately depicts the

Resource Protection District as approved by DEP under the Town's '93 Ordinance and is consistent with the Guidelines and the current Ordinance.

The Town asks the Board to approve the current Ordinance and Shoreland Zoning Data Map as adopted by the Town on March 11, 2009. In particular, the Town seeks approval of the 14 lots shown on Exhibit G hereto as designated on the Town's Zoning Data Map.

The Town requests an evidentiary hearing and the opportunity to present witnesses and exhibits at the convenience of the Board.

Dated this 3rd day of June, 2009



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Appeal Exhibits: To the Board of Environmental Protection, DEP Case#13-09

- Exhibit A. Georgetown Shoreland Zoning Ordinance, adopted November 18, 1993.
- Exhibit B. Georgetown Shoreland Zoning Ordinance, adopted March 11, 2009
- Exhibit C. Administrative Rule 06-096 Chapter 1000, Guidelines For Municipal Shoreland Zoning Ordinances.
- Exhibit D. Decision and Order: Moger v. Georgetown, Superior Court, Sagadahoc County, Docket No. AP-06-08, August 6, 2007.
- Exhibit E. Shoreland Zoning Maps as approved by Georgetown March 11, 2009.
- Exhibit F. Shoreland Zoning Maps as annotated by DEP's Mike Morse Dated 7/1/08
- Exhibit G. Lots DEP ordered placed into Resource Protection
- Exhibit H. Appellant further reserves the right to present any documents, correspondence, maps, communications of any nature or any other things relied upon by DEP in reaching its decision and Order.